

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DUNKIN' DONUTS, INC., et al.	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
GUANG CHYI LIU, et al.	:	No. 99-3344
Defendants.	:	00-3666

MEMORANDUM AND ORDER

J. M. KELLY, J.

JUNE , 2002

Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company, were franchisees and owners of a Dunkin' Donuts retail doughnut shop located at 5100 City Line Avenue, Philadelphia, Pennsylvania pursuant to a Franchise Agreement. Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc. (collectively "Dunkin'"), have been attempting to terminate the Franchise Agreement with the Defendants since 1999. Dunkin' filed suit against the Lius, alleging breach of contract, fraud, trademark infringement and unfair competition. Dunkin' also filed a separate complaint, seeking injunctive relief. Presently before the Court are the following motions: (1) Defendants' Motion for Reconsideration of the Court's Order of February 14, 2002 only as to the Counterclaim for Breach of the Implied Covenant of Good Faith and Fair Dealing; (2) Plaintiffs' Motion to Strike Defendant's Handwritten and Improperly Signed May 2, 2002 Filing; and (3) Defendants' Objections to Magistrate Judge Thomas Rueter's Report and Recommendation of April 17, 2002.

I. FACTUAL BACKGROUND

A. Dunkin's Franchise System

Dunkin', a Delaware corporation with its principal place of business in Massachusetts, grants franchises to independent franchisees who operate Dunkin' Donuts shops throughout the United States and around the world. Dunkin' Realty is a wholly-owned subsidiary of Dunkin' that leases properties to Dunkin's franchisees. Franchisees, of whom there are approximately 3,700 nationally and 4,700 globally, primarily sell doughnuts, pastries, coffee and related products. Franchisees are licensed to utilize trade names, service marks and trademarks of Dunkin' in the operation of these shops. Franchisees also use specialty equipment, distinctive interior and exterior accessories, identification schemes, products, management programs, standards, specifications, proprietary marks and information. The general public knows and recognizes Dunkin' Donuts marks, and associates them exclusively with Dunkin's products and services.

B. Defendants' Franchise Agreement with Dunkin'

Pursuant to an Agreement to Transfer dated March 31, 1995 and a Franchise Agreement dated November 27, 1990, Defendants obtained a Dunkin' franchise in Philadelphia, Pennsylvania. As franchisees, Defendants were granted a license to use the Dunkin'

trademark. In return, Defendants were obligated to pay certain fees to Dunkin'. Pursuant to their Franchise Agreement, Defendants were required to pay: (1) weekly franchise fees of 4.9 percent of their gross sales¹; (2) weekly advertising fees of 5.0 percent of their gross sales; and (3) interest on unpaid fees. Failure to make these payments in a timely manner would constitute a default under the Franchise Agreement. In the case of such a default, Dunkin' was required to give Defendants written notice and a seven day "cure period" within which to cure the default. Failure by Defendants to cure the default before the expiration of the cure period would allow Dunkin', upon written notice, to terminate the Franchise Agreement.

The Franchise Agreement also contained many provisions relating to the continued use of trademarks after its termination. Specifically, the Franchise Agreement provided that: (1) "Upon any termination or expiration of this Agreement .

¹ Among other things, franchisees were required to accurately report weekly gross sales and to preserve all accounting and supporting documents. To verify gross sales, or in other words, to detect under-reporting, Dunkin' used a computer program known as "Quick Retail Sales Analysis" (QRSAs). QRSAs uses the records of franchisee's purchase of raw ingredients to calculate the amount of sales achieved by the franchisee. Paragraph 6.A of the Franchise Agreement provides that "DUNKIN' DONUTS representatives shall have the right to examine FRANCHISEE'S original books, records and supporting documents at reasonable times and to perform such tests and analyses as it deems appropriate to verify GROSS SALES." Intentional under-reporting of gross sales and falsification of financial data is good cause for terminating the Franchise Agreement.

. . Franchisee shall immediately cease to use . . . any methods associated with the name "Dunkin' Donuts," any or all of the Proprietary Marks [of Dunkin' Donuts]."); (2) "[A]ny unauthorized use or continued use after the termination of this Agreement shall constitute irreparable harm subject to injunctive relief"; and (3) "Continued use by Franchisee of Dunkin' Donuts' trademarks, trade names, Proprietary Marks, and service marks after termination of this Agreement shall constitute willful trademark infringement by Franchisee."

C. Defendants' Lease

On March 31, 1995, Defendants also obtained a lease to the property on which their franchise was located. Dunkin' Realty acted as the landlord. Pursuant to the Lease, as amended, Defendants agreed to pay the following amounts to Dunkin' Realty: (1) monthly rent of \$7,812.50; annual "percentage rent" in the amount by which twelve percent of the gross annual sales of their shop exceeded a specified annual base rent;² and (3) all real estate and other taxes relating to the premises, to be paid in monthly installments of 1/12 of the estimated annual real estate tax. If Defendants failed to make a timely payment, Dunkin' Realty could provide them with a written Notice to Cure. Failure

² Any outstanding amount of percentage rent was to be paid within fifty days of the end of the lease year.

to cure the default within ten days of such notice would entitle Dunkin' Realty to terminate the Lease. Dunkin' Realty could also terminate the Lease if the Franchise Agreement were to be terminated.

D. The Alleged Breach of the Lease and Franchise Agreement

Using the QRSA, Dunkin' determined that the Defendants under-reported their gross sales in 1998, in violation of the Franchise Agreement. As a result, on May 20, 1999, Dunkin' met with the Defendants and told Defendants they were terminating the Franchise Agreement. At this meeting, Dunkin' offered the Defendants the opportunity to sell their franchise to a third party on the condition that Defendants pay Dunkin' the estimated amount of unpaid fees plus attorney's fees. Defendants denied under-reporting and refused to give up the store. On June 30, 1999, Dunkin' filed suit seeking to end the Franchise Agreement.

While the first lawsuit was pending, Defendants became delinquent on the payments due under the Franchise Agreement. As of June 21, 2000, Defendants owed Dunkin' approximately \$43,000.00. Of this total, \$13,654.07 was for a year-end percentage rent charge under the Lease.³ On June 22, 2000,

³ Despite paying this amount in years past, and receiving an invoice in April, 2000 that explained the calculation of this charge, the Defendants claim that they were confused as to the source of this fee. Defendants also claimed to have serious difficulty speaking English or understanding simple business

Dunkin' served Defendants with a Notice of Default and Notice of Cure letter.

Defendants did not cure these defaults.⁴ Defendants claimed to have sent checks to Dunkin' in May, 2000. Pursuant to Dunkin's standard business practice, Defendants would always send their checks to a lockbox in North Carolina, from which the checks would be deposited in a bank within twenty-four hours of their receipt. Dunkin's bank did not receive the checks, dated May, 2000, until late in July. Defendants later admitted that they backdated the checks as part of a record keeping procedure. By July 12, 2000, Dunkin' served Defendants with a Notice of Termination of their Franchise Agreement with Dunkin' and their Lease with Dunkin' Realty. The Defendants refused to accept the termination of the Franchise Agreement and Lease, and continue to hold themselves out to the public as Dunkin' franchisees. As will be discussed more fully below, a preliminary injunction was issued. Defendants no longer occupy the premises as of this date and Dunkin' has sold the franchise to a third party.

transactions. At a September 18, 2000 hearing, however, it was revealed that Ms. Liu had been employed as a full time nurse for fourteen years, was certified in oncology, and did not need an interpreter while at work. Moreover, Mr. Liu was a doctoral candidate at the University of Pennsylvania prior to their purchase of the Dunkin' Donuts franchise.

⁴ By July 10, 2000, Defendants' deficiencies had grown to over \$46,000.00.

II. Procedural History

On June 30, 1999, Dunkin' filed suit in this Court, alleging Defendants violated the Franchise Agreement in two ways: under-reporting their sales and committing tax fraud. See Compl. in Civ. A. No. 99-3344. On July 20, 2000, Dunkin' filed a second Complaint and a Motion for Preliminary Injunction, alleging that the Defendants failed to make timely payments due under the Franchise Agreement. See Compl. in Civ. A. No. 00-3666. In the second lawsuit, Plaintiffs sought to: (1) enjoin Defendants from further use of the Dunkin' Donuts trademarks and trade names; and (2) require them to vacate the franchise property. The two cases were consolidated in September 2000. Motions for summary judgment for both cases were referred to Magistrate Judge Thomas J. Rueter.

A. Counterclaim of Breach of Implied Covenant of Good Faith and Fair Dealing

In response to Dunkin's assertion in Civ. A. No. 99-3344 that Defendants under-reported their sales and committed federal tax fraud, Defendants asserted several Counterclaims⁵ against

⁵ Defendants alleged the following Counterclaims: (1) breach of the Franchise Agreement by requiring excessive remodeling and failing to provide training, marketing support, access to new promotional products, and ongoing assistance with the operation of the business; (2) breach of the Franchise Agreement by wrongful termination; (3) breach of implied covenant of good faith and fair dealing; (4) breach of duty to cooperate/

Dunkin'. In resolving the various motions for summary judgment filed by both parties, Judge Rueter issued a Report, on December 20, 2000, recommending that this Court dismiss all of Defendants' Counterclaims. This Court then adopted and approved Magistrate Judge Rueter's Recommendation,⁶ denying summary judgment on Plaintiffs' claims but granting summary judgment as to Defendants' Counterclaims in favor of Dunkin'. See Dunkin Donuts, Inc. v. Liu, Civ. A. No. 99-3344, 2002 WL 442822 (E.D. Pa. Feb 14, 2002). Defendants' then filed a Motion for Reconsideration, but only as to this Court's dismissal of the breach of implied covenant of good faith and fair dealing Counterclaim.

hindrance of performance; (5) tortious interference with contractual relations; (6) fraud in the inducement and negligent misrepresentation; and (7) unlawful tying in violation of the Sherman Antitrust Act.

⁶ Defendants have a history of trouble retaining and keeping counsel and have at times acted pro se. They were first represented by Benjamin G. Lipman of Philadelphia, and then in October of 1999, switched to Goldstein & Loots, a Washington D.C. firm. In February of 2001, the Philadelphia firm of Reed Smith took over as Defense counsel. There was however, some dispute over the status of legal representation and as a result, the summary judgment motions were held in abeyance.

After Defendants retained new counsel, a status conference was held on May 7, 2001. As a result of the discussion during the conference, the Court allowed Defendants sixty additional days of discovery. At the conclusion of additional discovery, Defendants were granted leave to submit further briefing outlining the impact of any new evidence on any pending motion.

B. The Injunctive Relief Case

During the pendency of the first action, the Defendants failed to make timely payments due under the Franchise Agreement. As a result, Plaintiffs filed another action. See Compl. in Civ. A. No. 00-3666. Plaintiffs simultaneously filed a Motion for a Preliminary Injunction, which sought to enjoin Defendants from further use of the Dunkin' Donuts trademarks and trade names, and to require Defendants to vacate the franchise property. This Motion was predicated entirely on the delinquent payment issue.

Judge Rueter held an evidentiary hearing on the issue of the Preliminary Injunction and recommended that the Court issue a temporary injunction against Defendants. The Court approved and adopted Magistrate Judge Reuter's Report and Recommendation and issued a Preliminary Injunction against the Defendants on December 21, 2000. The Court further ordered the Defendants to cease use of Plaintiffs' proprietary marks and to deliver the premises at 5100 City Line Avenue, Philadelphia, Pennsylvania to an authorized representative of the Plaintiffs. See Dunkin' Donuts, Inc. v. Liu, Civ. A. No. 00-3666, 2000 WL 1868386, at *5 (E.D. Pa. December 21, 2000).⁷

⁷ Prior to the execution of the Preliminary Injunction, Defendants filed a pro se emergency petition to stay the injunction on January 16, 2001. This petition was denied without prejudice for failure to serve copy on counsels, both Plaintiffs' and Defendants'. A second Petition was filed and denied since Defendants had already vacated the premises and ceased using the proprietary marks. See Dunkin' Donuts Inc. v. Liu, Civ. A. No.

On August 6, 2001, Dunkin' filed a Motion for Summary Judgment on Counts I-IV Relating to Non-Payment, further seeking a permanent injunction. On March 18, 2002, Magistrate Judge Rueter held oral argument on the issue of a permanent injunction. On April 17, 2002, Magistrate Judge Reuter issued a Report and Recommendation, making the following recommendations: (1) Plaintiffs' Motion for a Permanent Injunction with respect to the Termination of the Franchise Agreement and Lease should be granted; (2) the Franchise Agreement and Lease should be deemed terminated as of July 12, 2000; (3) Plaintiff Third Party Dunkin Donuts Realty, Inc., should be found to have lawful possession of the premises located at 5100 City Line Ave, Philadelphia, Pa 19145; (4) Plaintiffs may renew their request for attorney's fees pursuant to Federal Rule of Civil Procedure 54; and (5) the Court should grant Plaintiff's motion to voluntarily dismiss all claims asserted in Civ. A. No. 99-3344 pursuant to Federal Rule of Civil Procedure 41(a)(2). Defendants filed objections.

00-3666, 2001 WL 111610 (E.D. Pa. Feb. 1, 2001).

III. DISCUSSION

A. Motion for Reconsideration of this Court's February 2002 Memorandum and Order as to Breach of Implied Covenant of Good Faith and Fair Dealing Counterclaim.

Defendants' original objections to Magistrate Judge Rueter's December 20, 2000 Report mainly rested on one ground, that Magistrate Judge Rueter did not consider the whole "record." The Court rejected the Defendants' arguments. See Dunkin' Donuts, 2002 WL 442822, at *3-4. The Defendants, in their present Motion for Reconsideration, essentially complain of the same deficiency in this Court's approval and adoption of Judge Rueter's Report. For the reasons stated below, the Court will reevaluate the Counterclaim for breach of implied covenant of good faith and fair dealing.

Motion for Reconsideration

The "purpose of a motion for reconsideration [under Local Rule of Civil Procedure 7.1(g)] is to correct manifest errors of law or fact or to present newly discovered evidence." See P. Schoenfeld Asset Management L.L.C. v. Cendant Corp., 161 F. Supp. 2d 349, 352 (D.N.J. 2001) (citing Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)). Such motions will only be granted where: (1) an intervening change in the law has

occurred; (2) new evidence not previously available has emerged; or (3) the need to correct a clear error of law or prevent a manifest injustice arises. Id. (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). Because reconsideration of a judgment after its entry is an extraordinary remedy, motions for reconsideration are to be granted "sparingly." Id. at 353 (citations omitted).

Reconsideration motions may not be used to relitigate old matters, nor to raise arguments or present evidence that could have been raised prior to the entry of judgment. Id. at 352 (citations omitted). There must be more than a mere disagreement with the court's decision or a recapitulation of the cases and arguments previously considered by the court when it rendered its original decision. Id. The party seeking reconsideration must bring forth dispositive factual matters or controlling decisions of law previously brought to the court's attention but not considered in its original decision. Id. at 353.

In disposing of the breach of implied covenant of good faith and fair dealing Counterclaim, Judge Rueter found the following. Defendants claimed Dunkin' manipulated the QRSA, a computer auditing program which they claimed was unreliable, to extort money from its franchisees. Judge Rueter, however, found that Defendants failed to put forth evidence that Dunkin' engaged in conduct evincing "an aspect of fraud, deceit, or

misrepresentation." See p. 13, Report and Recommendation of Magistrate Judge Rueter, December 20, 2000 (citing Dunkin' Donuts, Inc. v. Taseski, 47 F. Supp. 2d 867, 876 (E.D. Mich. 1999)). This Court agreed with Judge Rueter and as a result, dismissed the Counterclaim of implied covenant of good faith and fair dealing.

Defendants, in their Motion for Reconsideration, have pointed to a wrinkle in this Court's disposition of the Counterclaim for breach of implied covenant of good faith and fair dealing. As explained above, Judge Rueter's December 20, 2000 Report was correctly decided, based on the evidence and arguments presented to the Magistrate Judge before he issued his Report. In a brief filed almost a year later, however, Defendants advanced a slightly new theory underlying their Counterclaim of implied covenant of good faith and fair dealing. As explained in footnote 6 of this Memorandum and Order, this Motion was held in abeyance pending the resolution of Defendants' legal representation problems. After Defendants retained new counsel, this Court allowed Defendants additional discovery and allowed them to submit a supplemental brief. Defendants addressed the impact of the new discovery on the Counterclaim for breach of implied covenant of good faith and fair dealing but did so as part of their brief in Opposition to Plaintiff's Motion for a Permanent Injunction and For Summary Judgment on Counts I-IV

Relating to Non-payment, a claim asserted in the second lawsuit⁸. As there was an oversight of this brief at the time the Court issued its February 14, 2002 Memorandum and order, the Court will now take the time to comb through the arguments and exhibits presented in the December 2001 brief which Defendants argue create a genuine issue of material fact on the Counterclaim for breach of implied covenant of good faith and fair dealing.

Standard of Review for Summary Judgment

Summary judgment is proper if "the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c). This Court is required, in resolving a motion for summary judgment pursuant to Rule 56, to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. See id.

⁸ Dunkin's Motion in Limine regarding motive evidence was denied without prejudice to Plaintiffs' right to renew the motion after this Court's final disposition on the outstanding motion for summary judgment as of February 1, 2002.

at 255.

Furthermore, while the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, Rule 56(c) requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Rule 56(e) makes it clear that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

In the December 2001 brief, Defendants, rather than claiming that Dunkin' unlawfully used the QRSA to extort money from franchisees, argue that because the QRSA is an inherently unreliable auditing tool, Dunkin's charges of under-reporting are fabricated. Defendants theory is that the charges of under-reporting are a pretext for an improper motive, which is that Dunkin' terminates its Franchise Agreement so that they can resell the stores at a profit. Upon review of the arguments and

evidence presented in the December 2001 brief, the Court finds that the only new evidence presented by the Defendants as to the pretextual use of the result obtained through QRSA is the deposition of Michael Mershimer, senior executive loss prevention for Allied Domeq Quick Service Restaurants, Dunkin's parent company.

Defendants argue that an inference can be drawn from Mershimer's testimony that because Dunkin' discontinued using the QRSA, it is an unreliable tool which goes to Defendants' theory that Dunkin's under-reporting allegations were a pretext. The Court has read that portion of Mershimer's deposition and finds that there is no inference that can be drawn from Mershimer's testimony that Dunkin used the QRSA fraudulently against the Defendants. Mershimer testified that the QRSA is no longer being used as an auditing tool because Dunkin' found a better tool, not because there were any flaws with the QRSA⁹.

⁹ Defendants also complain that Dunkin Donuts of America, Inc. v. Minerva, Inc., 956 F.2d 1566, 1570 (11th Cir. 1992) was not discussed. Minerva need not be discussed because the auditing tool at issue in Minerva was the "yield and usage" method, not the QRSA.

Defendants also point to a previously filed report, dated May 25, 2000, which purports to show that the assumptions underlying Dunkin's use of the QRSA in auditing the Defendants in 1998 were wrong. Even if this report somehow creates a factual dispute over the reliability of the QRSA results, Defendants' allegation of improper motive is still rebutted by the fact that Dunkin' offered to allow Defendants to sell their store before and after litigation ensued.

Defendants also argue that the Counterclaim for breach of implied covenant of good faith and fair dealing should be revived because of the disposition in Dunkin' Donuts v. Shree Dev Donut LLC, 152 F. Supp. 2d 675 (E.D. Pa. 2001). In the Shree Dev case, Judge Yohn allowed the same counterclaim to go forward where the Defendants had made similar allegations of pretext. Shree Dev, 152 F. Supp. 2d. at 678. In Shree Dev, the defendants, who were accused of bribery, countered that Dunkin' fabricated the bribery charges so that Dunkin' could acquire the Pittsburgh stores for less than what the defendants were willing to pay, and then resell those stores for a profit. Id.

Defendants' attempt to equate the Shree Dev case with the Lius' case fails. The basic commonality between the two cases is the Defendants' legal theory that Dunkin' used a pretextual reason to terminate the Franchise Agreement in order to sell the store for a profit. Shree Dev involved a factual question of bribery charges. 152 F. Supp. 2d at 676. Here, the Lius were charged with under-reporting based on the result of the QRSA. As Magistrate Judge Reuter and this Court have repeatedly found, the Lius have presented no evidence that the QRSA was fraudulently used against them. Even if there is some factual question as to the results of the QRSA, Defendants' allegations of pretext are belied by unrefuted evidence that Dunkin' offered to allow Defendants to sell their store to a third party before and after

litigation began.¹⁰

Accordingly, as no new evidence has been presented which create a genuine issue of material fact as to the Counterclaim for breach of the implied covenant of good faith and fair dealing, Defendants' Motion for Reconsideration is denied.

B. Objections to Report and Recommendation of April 17, 2002

In response to Magistrate Judge Rueter's Report and Recommendation of April 17, 2002, the Defendants filed two separate objections on May 2, 2002. Defendants' counsel of record, Reed Smith, filed one and Defendant Guan Chyi Liu filed another, handwritten and signed by him. Before turning to the merits of Defendants' objections, the Court will address Plaintiffs' objection to the handwritten Motion filed by Defendant Guang Chyi Liu.

1. Plaintiff's Motion to Strike Defendant's Handwritten
And Improperly Signed May 2, 2002 Filing

Federal Rule of Civil Procedure 11 provides that "[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record" and permits a party to sign only if

¹⁰ See Certification of Robert L. Zisk, Esq., Ex. A to Plaintiff's Mem. Supp. Mot. in Limine Regarding Motive at 3-4; Dep. of Jack Laudermilk, Ex. B; Letter of Thomas Carroll, Esq. to Jeffrey Goldstein, Esq., Ex. C.

"the party is not represented by an attorney." The Defendants are represented by Reed Smith L.L.P. who filed an objection on behalf of all Defendants. As of this date, no withdrawal of counsel for any of the Defendants, including Defendant Guang Chyi Liu who claims he is now representing himself pro se, have been filed. See Local Civil Rule 5.1(c). Therefore, Defendant Guang Chyi Liu is not permitted to sign any papers submitted to this Court on behalf of himself. Accordingly, Plaintiffs' Motion to strike papers submitted by Defendant Guang Chyi Liu is granted.

2. Defendants' Objections to Report and Recommendation of April 17, 2002

Under 28 U.S.C. § 636(C) (1994), this Court is to make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. See also Fed. R. Civ. P. 72(b). It is clear that Defendants failed to make timely payments as required under the Franchise Agreement. Therefore, there is no dispute that the Defendants are in breach of the Franchise Agreement and Dunkin' had the right to terminate the Franchise Agreement. In the face of a clear violation, Defendants' pleaded the affirmative defense of unclean hands, contending that the Court should deny Dunkin' their Motion for a Permanent Injunction because Dunkin' had improper motives in attempting to terminate the Franchise

Agreement.

a. Defense of Unclean Hands

Defendants' objection to the Magistrate Judge's Report rests on one ground, that there exists an issue of fact as to Plaintiffs' entitlement to equitable relief because of Plaintiffs' unclean hands. "To prevail on an unclean hands defense, the defendant must show fraud, unconscionability or bad faith on the part of the Plaintiff." S&R Corp. v. Jiffy Lube International, Inc., 968 F. 2d 371, 377 n.7 (3d Cir. 1992)¹¹. The facts and legal arguments presented are essentially the same as those underlying the Counterclaim for breach of implied covenant of good faith and fair dealing. These arguments have been presented to this Court over and over, each time to no avail. Defendants have not presented any evidence which a reasonable juror could find rises to fraud, unconscionability or bad faith on the part of Dunkin'. Therefore, Magistrate Judge Reuter correctly ruled that the Defendants were not successful in raising the affirmative defense of unclean hands.

Defendants complain that Magistrate Judge Rueter did not distinguish Shree Dev, 152 F. Supp. 2d 675 and Minerva, 956 F.2d

¹¹ The Third Circuit, while noting defense of unclean hands was not raised in Jiffy Lube, nevertheless commented on the applicable standard.

1566. As previously discussed, the facts before the Shree Dev and Minerva courts and this Court are not identical, as Defendants contend. It is not clear to this Court what facts were available to Judge Yohn at the time he made his summary judgment decision in Shree Dev. The Court can only look to the facts presented in this case. In this case, the unrefuted evidence that Dunkin' offered to let Defendants sell their store to a third party, provided that the Defendants paid restitution for the alleged under-reporting,¹² belies Defendants' legal theory that Dunkin' acted with improper motive in attempting to end the Franchise Agreement.

Moreover, in the Shree Dev case, there was a factual dispute about the bribery charges. 152 F. Supp. 2d. at 676. As a result, Dunkin' did not ask for summary judgment on the

¹² Defendants for the first time object to this evidence based on Federal Rule of Evidence 408 which provides:

Evidence of (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. . . . This rule also does not require exclusion when the evidence is offered for another purpose.

Defendants' attempt to preclude this evidence at this stage fails. First, Defendants did not object to this evidence in their summary judgment motion nor in their attempt to revive their Counterclaim of breach of implied covenant of good faith and fair dealing. Even if they had, Rule 408 would not exclude this evidence because this evidence is not being used to prove or disprove the underlying claim of non-payment. Rather it is being used by Dunkin' to rebut charges of improper motive.

termination issue in Shree Dev. Here, there is no factual dispute that the Defendants were delinquent on the payments due under the Franchise Agreement. Because Defendants raised the affirmative defense of unclean hands to the equitable remedies due to Dunkin', premised on the fact of non-payment, the question before the Court is whether Defendants acted with unclean hands in seeking to terminate on the non-payment issue. As there is no dispute that Defendants failed to pay as required, whatever their reasons might be, the charge of non-payment is clearly not a fabrication. Moreover, even if there was evidence of ulterior motive for terminating the franchise agreement, a franchiser has the right to terminate the agreement when there is an otherwise legitimate basis for termination. Jiffy Lube, 968 F. 2d at 375.

b. Defendants' Unclean Hands

Finally, Defendants object to the finding that the Defendants themselves had unclean hands because Susan Liu offered an "incredible" explanation for Defendants' backdated checks. Her explanation was that Defendants dated their payments for the invoice due date, for reference, regardless of when actually paid.¹³ Magistrate Judge Reuter's finding that Susan Liu's

¹³ In support of their contention that Susan Liu's explanation is credible, the Defendants have attached hundreds of additional checks purportedly showing that the Lius made a regular practice of backdating their checks. While Defendants have proven themselves tenacious, this evidence is inadmissible

explanation was incredible is clearly justified in light of the several misrepresentations Defendants have made to this Court.¹⁴ No reasonable juror could find her statements credible. In any event, even if there was some dispute about whether the Lius regularly backdated their checks, this does not change the fact that the Lius attempted to misrepresent the dates of the checks to this Court to refute charges of delinquent payment and that in fact, violated the terms of the Franchise Agreement.

Accordingly, the Court adopts and approves Magistrate Judge Rueter's Report and Recommendation of April 17, 2002.

for several reasons. This evidence has not be authenticated in any manner. Even if this evidence was somehow authentic and reliable, it surely must have been available prior to this motion. These checks were not produced during discovery nor presented at any other relevant times.

¹⁴ The facts relating to the Defendants' credibility issue on the non-payment claim have been noted several times by this Court. Because Defendants specifically object to the Magistrate Judge's finding of credibility, this Court is compelled to note these misrepresentations again. See footnotes 3 and 4 and accompanying text of this Memorandum and Opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DUNKIN' DONUTS, INC., et al.	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	
	:	
GUANG CHYI LIU, et al.	:	
Defendants.	:	No. 99-3344
	:	00-3666

O R D E R

AND NOW, this day of June, 2002, upon consideration of the following motions: (1) Motion for Reconsideration of the Court's Order of February 14, 2002 only as to the Counterclaim for Breach of the Implied Covenant of Good Faith and Fair Dealing (**Doc. No. 172**) filed by Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company; (2) Summary Judgment on Counts I-IV Relating to Non-payment (**Doc. No. 150**) filed by Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc.; (3) United States Magistrate Judge Thomas Rueter's April 17, 2002 Report and Recommendation (**Doc. No. 174**) and Objections thereto (**Doc. No. 176**), filed by Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company; and (4) Motion to Strike Defendant Guang Chyi Liu's Handwritten and Improperly Signed May 2, 2002 Filing (**Doc. No. 178**) filed by Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc., the

Clerk of the Court is **DIRECTED** to **ENTER** the following **ORDER**:

1. Defendants' Motion for Reconsideration of the Court's Order of February 14, 2002 only as to the Counterclaim for Breach of the Implied Covenant of Good Faith and Fair Dealing (**Doc. No. 172**) is **DENIED**.
2. Plaintiffs' Motion to Strike Defendant's Handwritten and Improperly Signed May 2, 2002 Filing (**Doc. No. 178**) is **GRANTED**. The Clerk of the Court is **DIRECTED** to **STRIKE Doc. No. 176** and **Doc. No. 179**.
3. Magistrate Judge Rueter's Report and Recommendation of April 17, 2002 (**Doc. No. 174**) is **APPROVED** and **ADOPTED**.
Defendants' Objection (**Doc. No. 176**) is **DENIED**.
 - A. Plaintiffs' Motion for Summary Judgment on Counts I-IV Relating to Non-payment (**Doc. No. 150**) is **GRANTED**.
Judgment is **ENTERED** in favor of Plaintiffs, Dunkin' Donuts, Inc. and Third Dunkin' Donuts Realty, Inc. and against Defendants, Guang Chyi Liu a/k/a Fred Liu, Susan Yeh Liu and G.C.S.C.L. Company.
 - B. Plaintiffs' Motion for a Permanent Injunction with respect to the termination of the Franchise Agreement and Lease is **GRANTED**.
 1. Defendants' Dunkin' Donuts Franchise Agreement and Lease is terminated as of July 12, 2000.
 2. Plaintiff Third Party Dunkin Donuts Realty, Inc.,

has lawful possession of the premises located at
5100 City Line Ave, Philadelphia, Pa 19145.

4. Plaintiffs' motion to voluntarily dismiss all claims asserted in Civ. A. No. 99-3344 pursuant to Federal Rule of Civil Procedure 41(a)(2) is **GRANTED**. Civ. A. No. 99-3344 is **DISMISSED**.
5. The Clerk of the Court is **DIRECTED** to **MARK** this case as **CLOSED**.

BY THE COURT:

JAMES MCGIRR KELLY, J.